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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FAUSTINO RODRIGUEZ VILLA, Defendant and Appellant.	E053055 (Super.Ct.No. RIF133684) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed in part and reversed in part with directions.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Faustino Rodriguez Villa appeals after a jury convicted him of several drug offenses and active participation in a criminal street gang. Defendant

contends that one count must be reversed, as a necessarily included lesser offense of one of the other convictions, and he raises several sentencing issues. We agree with defendant that the conviction in count 3 (possession of methamphetamine) should be reversed and dismissed as a lesser included offense of count 1 (possession of methamphetamine for sale), and that the sentence on count 4 (active participation in a criminal street gang) should be stayed. Otherwise, however, we affirm the judgment, as we do not find defendant's remaining contentions persuasive.

FACTS AND PROCEDURAL HISTORY

On the evening of December 7, 2006, officers of the Riverside Police Department were undertaking a surveillance of defendant's house in Corona. The officers had received a tip that someone in the home was selling methamphetamine.

About 7:30 p.m., defendant arrived, driving a silver car. The stakeout team moved in immediately; about five or six officers dressed in raid jackets burst from the surveillance van and approached defendant. Defendant saw the officers and sprinted toward his front door. The officers, shouting that they were the police, pursued him. Defendant reached the front door, pushed it open slightly, and tossed something inside. Some of the officers heard a metallic clank, as if a metal object struck the floor.

Defendant surrendered and the officers handcuffed him. One of the officers found a small mints tin on the floor behind the front door. Family members emerged from bedrooms and came into the front room. One of the occupants of the house claimed that the tin belonged to him or her.

The tin contained two small baggies of methamphetamine—3 grams in one, and 0.8 grams in the other—as well as 13 empty baggies. The laboratory did not fingerprint the tin.

The officers searched defendant and found a digital scale in his front pocket. There was some crystalline residue on the scale. Defendant was also carrying $630 in currency in his wallet and a cellular telephone. A search of the residence turned up more digital scales in defendant's bedroom, another empty mints tin, and a "hide-a-can."

While the officers were conducting their investigation, two of defendant's associates, Rodolfo Pena and Blas Gutierrez, arrived at the house. Pena was driving and Gutierrez was in the front passenger seat of the newly-arrived car. The officers had Gutierrez get out of the car and they handcuffed him. Gutierrez denied having a gun, but admitted that he did have some methamphetamine in his pocket. Gutierrez had a baggie of six grams of methamphetamine, as well as $201 in cash, in his left front pocket. He also had a cellular telephone in his right front pocket. Pena was carrying $600 cash in his wallet.

Another detective searched Pena's car. In the center console, concealed under the cup holder, the detective found a digital scale, a glass smoking pipe, and a pay/owe sheet. One of the names on the pay/owe sheet was "Bola." When the officers began the investigation, they had been told that "Bola" was the nickname of the drug dealer living at the residence under surveillance. The officers determined that defendant was "Bola."

Defendant was charged by information (filed March 12, 2008) with four felony counts: possession of methamphetamine for sale (Health & Saf. Code, § 11378) (count

1); transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) (count 2); simple possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) (count 3); and active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)) (count 4). As to counts 1 and 2, the information further alleged that defendant had committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang. (Pen. Code, § 186.22, subd. (b).) The information also alleged that defendant had suffered two prior strike convictions (Pen. Code, §§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A)), and he had served two prior prison terms (Pen. Code, § 667.5, subd. (b)).

In July 2010, defendant moved to suppress evidence found in the search. (Pen. Code, § 1538.5.) The court denied the motion. Jury trial began in December 2010.

At trial, one of the police officers testified as a narcotics expert. He opined that the 3.8 grams of methamphetamine found in the tin were possessed for sale. Another police officer testified as a gang expert. The Corona Varrio Locos (or Corona Vatos Locos, or CVL) was a large gang with about 200 members in December of 2006. The gang's primary activities were possession of drugs for sale, transportation of drugs, robbery, and assault. The gang was especially known to deal in methamphetamine. Defendant had in the past admitted being a member of CVL. When defendant was booked into jail on his arrest in December 2006, defendant told the booking officer that he was a member of the "Fourth Street" gang in Corona; Fourth Street is a symbol associated with CVL. Defendant reported at booking that his gang moniker was "Bolla" (*sic*: Bola). Defendant has gang-related tattoos. Gutierrez, the passenger in Pena's car,

was also a member of CVL at the time of his and defendant's arrest. The expert opined that both the possession of methamphetamine for sale and the transportation of methamphetamine were committed for the benefit of CVL or in association with another CVL member.

On December 29, 2010, the jury returned verdicts finding defendant guilty as to all four felony counts. In addition, the jury found the gang enhancement allegations, as to counts 1 and 2, to be true. Trial on the prior conviction allegations had been bifurcated; defendant admitted all the allegations (strikes and prior prison terms).

Afterward, defendant asked the trial court to exercise its discretion to dismiss his strike priors. (Pen. Code, § 1385; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) The court proceeded to sentence defendant to 25 years to life on count 1 (possession of methamphetamine for sale) as a third striker, plus two years for the gang enhancement. The court imposed the same sentence (27 years to life, consisting of 25 years to life for a third strike plus two years for the gang enhancement) on count 2 (transportation of methamphetamine), but stayed the term pursuant to Penal Code section 654. The court imposed a third-strike sentence of 25 years to life on count 3 (possession of methamphetamine), but stayed that sentence under Penal Code section 654. The court imposed another sentence of 25 years to life on count 4 (active participation in a criminal street gang), and ordered that term to run consecutive to count 1. The court additionally imposed a one-year term for each of defendant's prison term priors. Defendant's total sentence was thus calculated at 54 years to life.

Defendant filed a notice of appeal on February 22, 2011.

ANALYSIS

I. Defendant's Conviction on Count 3 Must Be Reversed

Defendant first contends that his conviction of simple possession of methamphetamine, as charged in count 3, must be reversed because it is a lesser included offense of count 1, possession of methamphetamine for sale. All three drug-related charges—possession for sale, transportation, and simple possession—arose from the same facts and involved the identical quantity of methamphetamine, the same methamphetamine which was discovered inside the mints tin.

"The law prohibits simultaneous convictions for both a greater offense and a lesser offense necessarily included within it, when based on the same conduct. [Citation.] 'When the jury expressly finds defendant guilty of both the greater and lesser offense . . . the conviction of [the greater] offense is controlling, and the conviction of the lesser offense must be reversed.' [Citation.]" (*People v. Milward* (2011) 52 Cal.4th 580, 589.)

The People concede the correctness of defendant's argument. Accordingly, we order the conviction in count 3 reversed.

II. The Sentence on the Gang Participation Conviction Should Be Stayed

Defendant next contends that his conviction on count 4, active participation in a criminal street gang, should be stayed, because the crime in count 1 (possession of methamphetamine for sale) was used to prove an element of count 4.

Penal Code section 186.22, subdivision (a), defines the substantive offense of active participation in a criminal street gang. The elements of that offense are: (1) active, as opposed to merely nominal or passive, participation in a criminal street gang; (2)

knowledge that the gang's members engage in, or have engaged in, a pattern of criminal gang activity; and (3) willful promotion, furtherance, or assistance in felonious criminal conduct by members of the gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 56.)

Defendant points to *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (Fourth Dist., Div. Two) (*Sanchez*), a decision of this court, in which we held that, "[Penal Code] section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have 'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang' [citation], and (2) the underlying felony that is used to satisfy this element of gang participation." (*Id.* at p. 1301.) There, the defendant was convicted of robbery and of participation in a criminal street gang, where, "the underlying robberies were the act that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation. Accordingly, it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies. . . ." (*Id*. at p. 1315.)

Here, the jury was instructed that, in order to find defendant guilty on count 4 (active gang participation), it must first find him guilty of the crime of possession of methamphetamine for sale (count 1). The prosecutor's closing argument expressly relied on the conduct constituting count 1 (the possession-for-sale offense) as proof to meet one of the required elements to find defendant guilty as to count 4 (active participation in a criminal street gang). Under this court's holding in *Sanchez*, *supra*, the sentence on count 4 should thus be stayed pursuant to Penal Code section 654.

The People urge that this court should reconsider its holding in *Sanchez*, and instead adopt the analysis in a competing line of cases on the issue.

In *People v. Herrera* (1999) 70 Cal.App.4th 1456 (*Herrera*), the Fourth District, Division Three held that a defendant could be separately punished for both attempted murder and criminal street gang activity. There, the defendant participated in a drive-by shooting and personally fired a gun multiple times. He was convicted of two counts of attempted murder and one count of criminal gang activity. The court upheld sentencing on both the attempted murder counts, and the criminal gang activity count, on the theory that the objectives and motivations were independent from one another. In the attempted murders, the defendant's intent was simply to kill, without reference to the affiliations or identities of the victims. As to the gang activity offense, the defendant's intent was "more complex," consisting of intent to aid and support the gang, without reference to the nature of the crime he participated in. (*Id*. at pp. 1466-1468.)

People v. Ferraez (2003) 112 Cal.App.4th 925 (*Ferraez*), from a different panel of the same court, followed *Herrera*. The defendant there was convicted of possessing drugs for sale and of gang participation. The court held that the sentence on the gang offense need not be stayed, because, even though the defendant possessed the drugs with intent to sell, he also wanted to sell the drugs to promote or assist the gang. "While he may have pursued both objectives simultaneously, they were nonetheless independent of each other." (*Ferraez*, at p. 935.)

Yet another panel of the Fourth District, Division Three, in *People v. Vu* (2006) 143 Cal.App.4th 1009 (*Vu*), came to a different result, this time holding that the sentence

on the gang offense should have been stayed. The defendant there was convicted of a conspiracy to commit murder and criminal street gang activity; the objective of the conspiracy was a gang-related revenge shooting. Under those circumstances, the court distinguished *Herrera* and *Ferraez* on the basis that there was a "single criminal intent or objective . . . to avenge [a fellow gang member]'s killing by conspiring to commit murder. Although that intent or objective could be parsed further into intent to promote the gang and intent to kill, those intents were not independent. Each intent was dependent on, and incident to, the other." (*Vu*, at p. 1034.) *Vu* distinguished *Herrera* on the basis that there were two shootings and two victims, and distinguished *Ferraez* on the basis that the court could have found independent objectives in possessing the drugs for sale and intending to benefit the gang by selling the drugs. (*Vu*, at p. 1034.)

In *People v. Garcia* (2007) 153 Cal.App.4th 1499, the defendant was convicted of carrying a loaded, unregistered firearm in public, and of active participation in a criminal street gang, because he was carrying the gun in furtherance of gang activity. Yet another panel of the Fourth District, Division Three, without referencing *Vu*, followed *Herrera* and *Ferraez* in holding that the defendant could be separately punished for both offenses. The defendant "knew he was in possession of a firearm in public, and intended to commit that crime to promote or assist the gang. While he might have pursued these objectives simultaneously, they were independent of each other." (*Garcia*, at p. 1514, fn. omitted.)

In *Sanchez*, *supra*, 179 Cal.App.4th 1297, on the other hand, this court concluded that Penal Code section 654 precludes punishment in the same judgment for both gang participation and another felony, if the other felony is used to satisfy the element of the

gang participation offense, i.e., that the defendant has "'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang.'" (*Sanchez*, at p. 1301.)

This court determined that *Herrera* had in essence adopted a categorical rule that Penal Code section 654 never precluded multiple punishment for both gang participation and the underlying felony: "As long as there is (1) sufficient evidence of the specific intent necessary to support the conviction for gang participation, and (2) sufficient evidence of the specific intent necessary to support the conviction for the underlying felony, there is—as a matter of law—sufficient evidence that the defendant had two independent, if simultaneous, objectives." (*Sanchez, supra*, 179 Cal.App.4th 1297, 1311.) We also found that *Vu* was irreconcilable with *Herrera*; *Vu* purported to distinguish *Herrera* on the basis that, "the defendant was charged with a course of criminal conduct involving two gang-related, drive-by shootings in which two people were injured" (*Vu, supra*, 143 Cal.App.4th 1009, 1032-1034), but *Herrera* had in fact treated the underlying felony conduct as a single drive-by shooting. Both victims were injured on the first of two passes by the rival gang house. The distinction might address "why the defendant could be separately punished for the two attempted murders, [fn. omitted] not why he could be separately punished for gang participation *in addition to* the two attempted murders. And finally, the court's stated reasoning in *Herrera* had nothing to do with how many shootings there were or how many people were injured; indeed, it had nothing to do with the facts of the particular case at all. Thus, as we see it, *Herrera* simply cannot be reconciled with *Vu*." (*Sanchez, supra*, 179 Cal.App.4th 1297, 1313.)

We went on to explain "a number of problems with *Herrera*" (*Sanchez, supra*, 179 Cal.App.4th 1297, 1313), but focused on a point which we found dispositive: "Here, the underlying robberies were the act that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation. Accordingly, it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies. Gang participation merely requires that the defendant 'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of that gang . . . .' (Pen. Code, § 186.22, subd. (a).) It does not require that the defendant participated in the underlying felony with the intent to benefit the gang. [Citations.]

"In our view, the crucial point is that, here, as in *Herrera* and *Vu*, [the] defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself. Thus, the most analogous line of cases involves convictions for both felony murder and the underlying felony. It has long been held that [Penal Code] section 654 bars multiple punishment under these circumstances. [Citations.] The logic is that the underlying felony 'is a statutorily defined element of the crime of felony murder' [citation], and thus the underlying felony is 'the same act which made the killing first degree murder.' [Citation.]" (*Sanchez, supra*, 179 Cal.App.4th 1297, 1315.)

This split of authority was noted in some subsequent cases, and the California Supreme Court granted review to resolve the conflict. Recently, in *People v. Mesa* (2012) 54 Cal.4th 191, the California Supreme Court adopted our *Sanchez* analysis,

holding that Penal Code section 654 precludes multiple punishment for both the gang crime, and the underlying felony used to establish the gang crime, when both convictions are based on the same act. (*Id.* at pp. 197-198.) The Supreme Court disapproved *Herrera*. (*Id.* at p. 199.)

Here, as in *Sanchez* and *Mesa*, defendant was convicted both of possession of methamphetamine for sale and of the gang crime based on the identical act of possession. Where the gang crime is based on the same act as the underlying felony, defendant may be punished only for one, but not both, offenses. Accordingly, pursuant to Penal Code section 654, defendant's sentence on count 4 must be stayed.

III. Because the Sentence on Count 4 Is Stayed, Remand for Resentencing on Count 4 Is Not Required

When the trial court sentenced defendant on count 4, the gang crime, it imposed a consecutive term to that in count 1, possession of methamphetamine for sale. Defendant has argued that the trial court, in imposing the consecutive sentence, misunderstood the scope of its discretion; i.e., it believed it was required to impose a consecutive sentence, notwithstanding that both offenses arose from or were predicated on the same set of operative facts. The California Supreme Court has held, however, that the mandatory consecutive sentencing provision of the three strikes law applies only when the current felony convictions are not committed on the same occasion. When multiple current felony convictions are committed on the same occasion, or arise from the same set of operative facts, then consecutive sentencing is not required under the three strikes law. (*People v. Lawrence* (2000) 24 Cal.4th 219, 233.)

In connection with this argument, defendant also puts forth contentions that he did not waive the issue by failing to object at the time the court imposed the consecutive sentence, and alternatively that, if his attorney did waive the issue by failing to object, then counsel's performance was constitutionally incompetent.

We need not be detained by these contentions, however, in view of our determination that the sentence on count 4 must be stayed pursuant to Penal Code section 654.

IV. The Trial Court Did Not Abuse Its Discretion in Declining to Dismiss Defendant's Strike Priors

After his conviction, defendant filed a "preplea report," which included a request to the trial court to exercise its discretion under Penal Code section 1385 to dismiss one or more of his strike priors. (See *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497.) Defendant's papers included a detailed analysis of the factors he asked the court to consider, such as the nature of the prior offenses, the nature of the current offenses, and the nature of the offender, and argued that he should be considered outside the scope of the three strikes law.

When the trial court decides not to dismiss a prior conviction allegation under Penal Code section 1385, that decision is reviewed under the abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) As defendant recognizes, "a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court

considered impermissible factors in declining to dismiss [citation]." (*Id.* at p. 378.) Striking a prior serious felony conviction "'"is an extraordinary exercise of discretion, and is very much like setting aside a judgment of conviction after trial." [Citation.]' [Citation.] Accordingly, such action is reserved for '[e]xtraordinary' circumstances. [Citation.]" (*People v. Philpot* (2004) 122 Cal.App.4th 893, 907 [Fourth Dist., Div. Two].) "Further, a sentence will not be reversed merely because reasonable people might disagree. '"'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.]" (*People v. Leavel* (2012) 203 Cal.App.4th 823, 837.)

As in *Leavel*, *supra*, defendant here "has not shown extraordinary circumstances warranting reversal. The record shows the court was aware of its discretion under *Romero*. . . . Additionally, the record does not suggest the court considered impermissible factors." (*People v. Leavel*, *supra*, 203 Cal.App.4th 823, 837.)

Defendant's detailed analysis of the factors considered shows no more than that he disagrees with the court's analysis. As we have just stated, however, it is not enough to show that reasonable people might disagree about whether the court should have dismissed one or more of defendant's strikes. (See also *People v. Mosley* (1997) 53 Cal.App.4th 489, 497.)

Defendant attempted to characterize some of his current offenses (drug charges) as minor or less serious than other crimes, but the trial court was not obliged to adopt defendant's evaluation. The trial court was neither irrational nor arbitrary in considering defendant's current offenses, drug trafficking on behalf of his gang, quite serious indeed.

Defendant also attempted to minimize his criminal history, but the "remoteness" of some of his crimes cuts both ways, as it also indicates the length of his criminal history. The court did agree with defendant that one of his crimes, a 1992 strong-arm robbery (i.e., no weapon was used, merely force or intimidation, to accomplish the taking), was perhaps at the "low end of the scale," but expressly did *not* agree that his 1998 burglary and witness-dissuasion convictions were at the "low end of the spectrum." There was only an eight-year gap between defendant's 1998 strike conviction and his criminal conduct in the instant offenses. The intervening eight years were not "legally blameless" (*People v. James* (1978) 88 Cal.App.3d 150, 156), as defendant violated his parole several times. He was on parole at the time he committed the current offenses, in fact, and the court noted he had only been released on parole the last time about nine months before he was arrested for the new crimes.

As to defendant's background and prospects, defendant's poor performance on probation and parole indicated that he engaged in a "continuing stream of criminality" which did not take him outside the spirit of the three strikes law. Defendant has not shown that the trial court's assessment was either irrational or arbitrary.

Defendant has failed to establish that the trial court abused its discretion in declining to dismiss his strike priors.

V. Defendant's Sentence Does Not Constitute Cruel or Unusual Punishment

Finally, defendant urges that a sentence of 54 years to life for his current offenses constitutes cruel or unusual punishment (Cal. Const., art. I, § 17), or cruel and unusual punishment (U.S. Const., 8th Amend.). We need not address the matter, however,

inasmuch as defendant's sentence has been altered by our determination of other issues on appeal. We have ordered the conviction on count 3 reversed, and we have ordered the sentence on count 4 stayed. Defendant's aggregate sentence has thus been ordered modified to 29 years to life, not 54 years to life.

A sentence of 29 years to life is not "grossly disproportionate" to the offense and the offender, when applied to someone like defendant, who is a recidivist criminal. (See *Ewing v. California* (2003) 538 U.S. 11, 20-21, [123 S.Ct. 1179, 155 L.Ed.2d 108] [sentence of 25 years to life in prison for felony theft of golf clubs under California's three strikes law, with prior felonies of robbery and burglary, did not violate federal prohibition on cruel and unusual punishment].) In a noncapital case, successful proportionality challenges are "exceedingly rare." (*Ibid*.) This is not such an "exceedingly rare" case.

Defendant's claim fares no better under state constitutional standards of disproportionality. Under the state constitutional provision, the court should consider the nature of the offense and the offender, and should also compare the penalty with penalties prescribed within the state for different, more serious offenses, and should compare the penalty with those for the same offense in other jurisdictions. Defendant here has a history of criminal conduct, which he appears unwilling and unable to conform to the requirements of the law. He failed to learn from earlier interventions, but continued to maintain a criminal lifestyle with active gang involvement. He thus poses a severe danger to others and to society. Defendant's sentence is not disproportionate to other sentences in California for recidivists who have committed at least two qualifying serious

or violent felonies. Defendant is not similarly situated with someone who may have committed a more serious crime, but who is a first-time offender. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512.) Neither has defendant shown that the three strikes law violates interstate disproportionality concerns. Even if California's law is harsher than other jurisdictions, that fact alone does not render the punishment unconstitutionally cruel or unusual. California need not "march in lockstep with other states in fashioning a penal code," nor adhere to a "least common denominator" formulation of its penalties. (*Id*. at p. 1516.)

DISPOSITION

Because count 3 is a lesser included offense of count 1, the conviction as to count 3 must be reversed, and that charge dismissed. The term on count 4, the gang crime, must be stayed pursuant to Penal Code section 654. With these modifications, the judgment is otherwise affirmed. The trial court is directed to modify the judgment as stated, and to issue a corrected abstract of judgment reflecting the reversal and dismissal as to count 3, and the stay of sentence as to count 4. The court is also directed to forward a copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

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MCKINSTER
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.